IN THE SUPREME COURT OF MISSOURI

JOHN DOE 1631, Plaintiff/Appellant, vs. QUEST DIAGNOSTICS, INC., LABONE, INC., and QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC. d/b/a QUEST DIAGNOSTICS, Defendants/Respondents.	)	No. SC92790 Appeal from the Circuit Court of the City of St. Louis Cause No. 0822-CC07710

SUBSTITUTE REPLY BRIEF OF APPELLANT

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I. RESPONSE TO RESPONDENTS' NEW ARGUMENT

Respondents inconspicuously introduce a new argument that is not an issue on appeal, imbedding it into the last point made in their brief to this Court. Respondents now claim that Appellant's allegations of instructional error need not be reached, because Appellant failed to file an affidavit of merit as required by §538.225 RSMo., and his claims should never have been submitted to the jury. (*Respondents' Brief*, 54). As an initial matter, this Court should not consider Respondents' new argument, because it was not properly preserved for appeal, and Respondents did not properly raise it in this Court by filing a cross appeal. Moreover, it is not an issue that supports the judgment for Respondents on the jury verdict, as the proper remedy would be a dismissal without prejudice. §538.225.6 RSMo. Should this Court conclude that Respondents' new argument is, in fact, properly before it, Respondents' argument is meritless. Respondents cannot claim they were functioning as a "healthcare provider" when they disclosed Appellant's confidential test results without his consent, or that they provided a "healthcare service" for purposes of Chapter 538, and Appellant's "true claim" is for the unauthorized disclosure of confidential information, not medical malpractice.

A. Respondents cannot now complain of any alleged trial errors because they (1) failed to properly preserve the issue or file a cross appeal, (2) waived their right to dismissal under §538.225, and (3) a finding that an affidavit was required would result in dismissal without prejudice.

1. Because Respondents failed to properly preserve the issue or file a cross appeal, they may not now complain of trial errors committed against them.

In its response to Appellant's motion for new trial, Respondents failed to raise the issue of the court's denial of Respondent's motion to dismiss under §538.255.[1] A party who fails to preserve an error in a motion for new trial is held to have failed to preserve the point on appeal. Roberson v. Weston, 255 S.W.3d 15, 19 (Mo.App. 2008). In failing to properly preserve this issue by raising it in a post trial submission to the trial court, Respondents are barred from raising it on appeal now.

In addition, the trial court correctly denied Respondents' motion to dismiss under §538.225. (TR 131-32). At trial, the jury found for Respondents on Appellant's claims. Thus, Respondents were not an "aggrieved party" with standing to appeal the judgment in their favor. §512.020, RSMo. The general rule is that a respondent who does not cross appeal has no standing to complain of trial errors committed against it. Senter v. Ferguson, 486 S.W.2d 644, 648 (Mo.App. 1972). An exception to the rule is that a respondent who has not suffered an adverse judgment may attack erroneous rulings of the trial court for the purpose of sustaining a judgment in the respondent's favor. Id. In this case, however, the trial court's denial of Respondents' motion to dismiss would not be a basis for sustaining the judgment in Respondents' favor. Had Respondents prevailed on

[1] Respondents could have raised the issue under Rule 78.07(a) or (c), as an alternative to their argument in response to plaintiff's post trial motions but did not.

their motion to dismiss, the trial court would have dismissed Appellant's petition *without prejudice*. §538.225.6, RSMo. Unlike a judgment following a jury verdict, a dismissal under §538.225 would not have disposed of the action on the merits, because under the savings statute, §516.230, RSMo., Appellant would have been permitted to recommence his action if it were still timely or within a year from the date of dismissal. Thus, Respondents improperly ask the Court to affirm the judgment on the basis of the denial of a previous motion which would not provide a basis for affirming the trial court's judgment upon the jury verdict. While Respondents are generally permitted to argue trial court errors that are relevant to the validity of the judgment, the trial court's alleged failure to grant the §538.225 motion to dismiss is not one of those errors.

2. Respondents effectively waived their rights under §538.225 by waiting over two years to raise it.

Respondents waived any right they had to dismissal under §538.225, because their actions in this case were wholly inconsistent with an intent to enforce their rights under the statute. *See generally*, Greenberg v. Koslow, 475 S.W.2d 434, 438 (Mo.App. 1971)("[A] right may be waived by conscious acquiescence in its persistent violation."); Bartleman v. Humphrey, 441 S.W.2d 335, 343 (Mo. 1969)(express declarations or conduct must be "so consistent with intention to waive that no other reasonable explanation is possible.").

Section 538.225.1 requires a plaintiff in a medical malpractice action to file an affidavit stating that he or she has obtained a written opinion from a legally qualified health care provider attesting to the merit of the claims. White v. Tariq, 299 S.W.3d 1, 3

(Mo.App. 2009). Section 538.225.5 also mandates that "[s]uch affidavit shall be filed no later than ninety days after the filing of the petition unless the court, for good cause shown, orders that such time be extended for a period of time not to exceed an additional ninety days." Id. "As a sanction for non-compliance, Section 538.225.6 provides for dismissal, stating that '[i]f the plaintiff or his attorney fails to file such affidavit the court shall, upon motion of any party, dismiss the action against such moving party without prejudice.'" Id. The intent of §538.225 is to "protect the public and litigants from the cost of ungrounded medical malpractice claims." Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503, 507 (Mo. 1991). In that regard, Respondents relinquished their right to seek dismissal of this action "at an early stage of litigation." Id.

Here, Appellant filed his original petition on July 8, 2008. (LF 11). Respondents had the right to file their motion to dismiss as of January 4, 2009, 180 days after the filing of the petition as required by the statute. Instead, Respondents elected to engage in discovery and extensive summary judgment litigation. (LF 8). It wasn't until November 30, 2010, *one week before trial*, that Respondents decided to invoke §538.225. (LF 5). At the hearing on Respondents' motion to dismiss, the trial court asked Respondents' counsel why they had waited over two years to file their motion. (TR 125). Counsel for Respondents admitted that they deliberately waited to file the motion until after the Court's ruling on its summary judgment motion, knowingly waiving their right to move for dismissal under §538.225. (TR 125-27). Respondents made a decision to first attempt to secure a judgment on the merits, but when that didn't happen, and the trial

court denied Respondents' motion to dismiss, Respondents made another decision to *not* raise the issue in their response to Appellant's motion for new trial and instead waited to renew the issue before the Court of Appeals and this Court. The Court of Appeals never addressed this issue. This Court should find that Respondents' delay in seeking dismissal under §538.225 constituted waiver.

3. A finding that an affidavit of merit is required under §538.225 would not support a judgment for Respondents, rather, it would only result in dismissal without prejudice.

Should this Court determine that Respondents' new argument is well-taken, it is not a basis upon which the Court would affirm the judgment, as the proper remedy would be a dismissal without prejudice. Were the Court to affirm on this basis, Appellant will have sustained a final judgment against him and would be barred by claim preclusion principles from refiling his case. Respondent would be in a better position than if the trial court had granted the motion to dismiss. If this Court concludes the trial court erred in not granting the motion to dismiss, it should not affirm the judgment, but rather, vacate and remand for further proceedings.

B. Under Chapter 538, Respondents cannot claim (1) to be a "health care provider" as defined by the statute, (2) that they were functioning as a health care provider, or (3) that they were providing a "health care service."

1. Respondents cannot claim to be a "health care provider" under Chapter 538.

Even if this Court is willing to entertain Respondents' new argument on appeal, Respondents cannot claim to be a health care provider as defined by the statute. A "health care provider" is defined in pertinent part as follows:

> [A]ny . . . entity that provides health care services under the authority of a license or certificate.

Section 538.205(4).

At the hearing on their motion to dismiss, Respondents failed to produce any evidence or argument that it, or any of its employees, provides health care services *under authority or licensure*, and Appellant made no admissions in this regard. (SLF 511-528, TR 97-132). Thus, the trial court could not have found that Respondents were a "health care provider" for purposes of the statute, and it properly declined to grant the motion to dismiss.

Respondents also improperly request that this Court take judicial notice of the fact that Respondents possess a "CLIA" number and that one of Quest's medical directors is licensed in Missouri. (*Respondents' Brief*, 60). While a court may, at its discretion, take judicial notice of certain matters which are common knowledge, evidence cannot be presented for the first time on appeal. *See generally,* Thummel v. King, et al., 570 S.W.2d 679, 686 (Mo. 1978); Jackson v. Cherokee Drug Co., 434 S.W.2d 257, 265 (Mo.App. 1968). Courts of appeals are not fact-finding tribunals—they are reviewing bodies that evaluate harmful errors made at trial which were objected to specifically and in a timely manner. The facts and issues that relate to a case must be presented through briefing, testimony, and/or evidence at trial, not before courts of appeals, and the

preservation of the record in this regard is one of the most fundamental principles of appellate practice. Accordingly, this Court should disregard Respondents' argument.

2. Respondents were not *functioning* as a health care provider when they disclosed Appellant's confidential medical information.

Even if this Court finds that Respondents can be considered a "health care provider" under Chapter 538, Respondents were not *functioning* in the capacity of a health care provider when they breached their duty of confidentiality. Perhaps the most illustrative case on this issue is Morrison v. St. Lukes Health Corp., 929 S.W.2d 898 (Mo.App. 1996), in which a patient brought suit against a hospital for injuries she sustained when she tripped over a brief-case left in the hallway. Defendants challenged the submissibility of the case, because plaintiff, in suing a health care provider, failed to file a health care affidavit. The Court stated that "[t]he purpose of §538.225.1 is to eliminate at the early stages of litigation medical malpractice actions against health care providers which lack the color of merit and to protect the public against the cost of ungrounded medical malpractice claims." Morrison, 929 S.W.2d at 905 (*citing* Mahoney, 807 S.W.2d at 507). The Court held:

> When plaintiff fell her status was that of an invitee and St. Luke's status was that of an owner and/or occupier of the premises on which plaintiff was injured. There was no need for expert testimony to establish the standard of care of a professional health care provider, because St. Luke's was not functioning in that capacity when plaintiff sustained injury as a result of a fall over the briefcase. The cases requiring a health care affidavit . . .

> involve instances of the alleged negligence of a health care provider where the health care provider was acting in that capacity and where it was essential that the plaintiff establish by expert testimony that the health care provider deviated from the accepted standard of care.

Id. at 905. The Morrison Court concluded that plaintiff's cause of action was not a medical malpractice action, the type clearly addressed by § 538.225, thus, it was not necessary for the plaintiff to file an affidavit, because the hospital was not functioning in the capacity of a health care provider when the plaintiff sustained her injury. Therefore, expert testimony was not required to establish the standard of care.

Here, Respondents, in faxing a document, were not functioning in the capacity of a health care provider. Appellant does not allege that Respondents deviated in their standard of care, because Respondents were not functioning in the capacity of a health care provider—they were functioning as a *fax machine operator*. Notably, the trial court held that no expert testimony is required to prove Appellant's claims. A health care affidavit is only required in instances of the alleged negligence of a health care provider where the health care provider was *acting in that capacity* and where it was essential that the plaintiff establish by expert testimony that the health care provider deviated from the accepted standard of care. Id. at 905. Therefore, no health care affidavit was required.

3. Respondents were not providing a "health care service" when they disclosed Appellant's confidential medical information, because the act of faxing a document involves no medical judgment.

Even if this Court determines that Respondents can claim to be a "health care provider" and/or were *functioning* as a "health care provider," Respondents were not providing a health care service when they breached their duty to Appellant. The act of faxing a document, whether or not performed by a health care provider, involves no medical judgment, thus, it does not rise to the level of a "health care service." Health care services are defined as "any services that a health care provider renders to a patient in the ordinary course of the health care provider's profession or, if the health care provider is an institution, in the ordinary course of furthering the purposes for which the institution is organized." § 538.205(5), RSMo.

In Meekins v. St. John's Regional Health Center, Inc., 149 S.W.3d 525 (Mo.App. 2004), the Court addressed whether performing a drug test is a health care service. The plaintiff filed suit after a drug screen test performed by defendant showed plaintiff was positive for amphetamines. Plaintiff claimed the hospital negligently breached its duty to properly perform the test or use reliable testing procedures. The trial court dismissed the suit finding that plaintiff failed to file a health care affidavit pursuant to §538.225.1 and that plaintiff's claims were time-barred under the two-year medical malpractice statute of limitations. On appeal, the Court noted that whether a hospital that performs a drug screen test is a health care provider and whether a drug screen test was a health care service had not yet been directly answered in a Missouri case. The Meekins court relied on cases decided in other jurisdictions in concluding that plaintiff's claim was for negligence, not for medical negligence, and because a drug screen test was not a health care service, no health care affidavit was required. Id. at 532-533 (*citing* Williams v.

Nat'l R.R. Passenger Corp., 16 F. Supp. 2D 178, 181-82 (D.Conn. 1998); Price v. City of Bossier City, 693 So. 2d 1169 (La. 1997); and Nehrenz v. Dunn, 593 So. 2d 915 (La.App. 1992)).

Here, Respondents breached a fiduciary duty of confidentiality and violated §191.656 RSMo. when they faxed the results of Appellant's blood test to his place of employment without his consent. The act of faxing a document, however, is not a health care service. There is no need for expert testimony to establish the standard of care that is required of a health care provider when it is sending a fax. In fact, the act of dialing a telephone number to send a fax is even more remote from what is considered "providing health care" or "providing treatment" than the act of administering a drug test. Missouri courts have already found that a claim for the negligent administration of a drug test does not sound in medical malpractice, thus, the act of faxing a document surely does not rise to the level of a health care service under Missouri law. Because Appellant's claim against Respondents for their unauthorized faxing of Appellant's private medical information is not an action for medical negligence, providing health care, or providing treatment, no health care affidavit is required.

C. Appellant's "True Claim" is for the unauthorized disclosure of confidential information, not medical malpractice.

Missouri courts hold that a health care affidavit is required when a plaintiff's "true claim" for damages relates to the wrongful acts of a health care provider in providing health care treatment. Devitre v. Orthopedic Center of St. Louis, LLC, 349 S.W.3d 327

(Mo. 2011); Crider v. Barnes-Jewish St. Peters Hospital, Inc., 363 S.W.3d 127 (Mo.App. 2012).

In Devitre, the plaintiff brought suit for assault and battery against a doctor to whom plaintiff had been referred for an independent medical examination after an accident. This Court determined that defendant was a health care provider and the independent medical examination performed was a health care service, stating that plaintiff's claim "is not saved by his characterization of his cause of actions as battery and assault because he failed to plead the essential elements of an assault and medical battery. The petition shows that assault and battery are not Mr. Devitre's true claims; his true claim sounds in medical malpractice." Id. at 334. *See also* Jacobs v. Wolff, 829 S.W.2d 470, 472-73 (Mo.App. 1992)(plaintiff's "true claim" for damages related to the wrongful acts of a health care provider in providing health care treatment); St. John's Reg'l Health Ctr., Inc. v. Windler, 847 S.W.2d 168, 171 (Mo.App. 1993)(plaintiff's "true claim" required affidavit because basis of allegation was medical determination that she needed to be confined); Vitale v. Sandow, 912 S.W.2d 121 (Mo.App. 1995)(doctor's letter to patient's employer intimating malingering related to proper medical diagnosis).

In a recent decision on the issue of a plaintiff's "true claim," the Eastern District Court of Appeals determined whether a party must file a health care affidavit "by considering whether the relationship between the parties is one of health care provider and patient, and if the 'true claim' relates only to the provision of health care services." Crider, 363 S.W.3d 127 (*citing* Devitre, 349 S.W.3d at 332-34). In Crider, the plaintiff was a deaf woman who had been admitted into defendant's facility to give birth. Plaintiff

claimed she notified defendant of her desire to have a natural childbirth without pain medications. Defendant encouraged plaintiff to have an epidural, but it did not provide her with an interpreter to explain why it was necessary. Plaintiff brought suit under the Missouri Human Rights Act, claiming that because defendant failed to provide her with an interpreter, defendant failed to properly obtain plaintiff's consent to the epidural. Id. at 128-29. The Court found that the defendant hospital was a health care provider under Chapter 558, and that plaintiff was under defendant's care, thus "the relationship between the parties was one of health care provider and patient." Id. at 130-31. The Court concluded that plaintiff's "true claim" relates only to the provision of health care services because the wrong alleged was the manner in which defendant obtained plaintiff consent to a medical procedure. Id.

Respondents rely heavily on the Southern District's holding in J.K.M. v. Dempsey, 317 S.W.3d 621, 627 (Mo.App. 2010) for the premise that Appellant's "true claims" sound in medical malpractice. As in Crider, the J.K.M. court addressed the issue of whether plaintiff's claim that a health care provider failed to obtain consent to perform a medical procedure required a health care affidavit. Plaintiff brought suit against a physician for breach of fiduciary duty and assault and battery after plaintiff was given a shot that the physician claimed was a "famous Swiss wart burner vaccine." Id. at 623. The defendant later revealed that the shot was a saline solution, purportedly given as a placebo effect. Id. n.3. Plaintiff alleged that defendant "owed a *fiduciary duty* to [Plaintiff] to properly inform [Plaintiff] of the medical benefits of the *treatment* to be performed to properly obtain his informed consent to participate in such *treatment*." Id.

at 627. The petition further claimed that the defendant "breached his fiduciary duty of obtaining consent to a worthless and painful course of *medical treatment*." Id. (emphasis in original). The court determined:

> Plaintiff's true claim is that Defendant failed to appropriately obtain informed consent and rendered improper medical services. "The basic philosophy in malpractice cases is that the doctor is negligent by reason of the fact that he has failed to adhere to a standard of reasonable medical care and that consequently the service rendered was substandard and negligent'". . . . "This applies whether the alleged malpractice consists of improper care or treatment or a failure to sufficiently inform a patient to enable the patient to give informed consent to the treatment."

J.K.M., 317 S.W.3d at 627 (*citing* Wuerz v. Huffaker, 42 S.W.3d 652, 656 (Mo.App. 2001)(*quoting* Aikan v. Clary, 396 S.W.2d 668, 673 (Mo. banc 1965)). The J.K.M. court concluded that because the true nature of the plaintiff's claim was personal injury resulting from defendant's rendering of health care services, plaintiff was required to file a health care affidavit. Id.

Here, unlike the plaintiffs in Devitre, Crider, and J.K.M., Appellant's "true claim" is not based on any allegations of medical malpractice—they are based upon a breach of fiduciary duty and statutory negligence under § 191.656, RSMo. The Devitre plaintiff failed to properly plead assault and battery, and his claims sounded in medical malpractice because his injuries resulted in health care services received by a health care provider in the ordinary course of the health care provider's profession. Yet here,

Respondents have not alleged that Appellant failed to properly plead his claims for breach of fiduciary duty and wrongful disclosure of medical records in violation of §191.656. And the "true claims" of the plaintiffs in Crider and J.K.M. were that defendant failed to properly obtain informed consent, notably, *consent to perform a medical procedure.* Appellant, does not claim that Respondents failed to obtain consent to perform a medical procedure; he claims that Respondents failed to obtain *consent to disclose his confidential medical test results*. Appellant's "true claim" does not require a health care affidavit, because the basis of his claims have nothing to do with a medical determination, medical negligence, medical treatment or the provision of health care services. Appellant's "true claim" is for the unauthorized disclosure of confidential information, not medical malpractice. Accordingly, even if this Court finds that Respondents' new argument has been properly raised, it should find the argument lacks merit.

II. REPLY REGARDING THE ISSUE OF FIDUDIARY DUTY

A. Instruction No. 6 misstated the law and Appellant made a submissible case because he was not required to show negligence.

1. The Court of Appeals incorrectly held that Doe failed to establish that Quest owed him a fiduciary duty of confidentiality.

Under the facts of this case and the applicable law, Respondents clearly owed Appellant a fiduciary duty of confidentiality, and the Court of Appeals incorrectly held that such a duty had not been established. At trial, Appellant argued, and the trial court agreed, that Respondents did, in fact, owe a fiduciary duty of confidentiality to Appellant

(SLF 548; TR 127-28, 473-74). Moreover, Respondents did not request an instruction requiring that the jury find they owed a fiduciary duty. (TR 511-20). Respondents were under a duty to act for the benefit of Appellant on matters within the scope of their relationship—a duty that arises from federal and state statutes and because Appellant placed trust in the faithful integrity of Respondents to treat his confidential medical information with the utmost care. Their relationship and the duty owed by Respondents to Appellant is indeed comparable to the specific relationships that have traditionally been recognized as involving fiduciary duties, such as a physician and a patient, a lawyer and a client, or a stockbroker and a customer. At trial, Respondents expressly acknowledged the confidential nature of blood test results and the confidence placed in them in acquiring such information when they admitted at trial that Respondents have established policies and business practices for protecting the disclosure of confidential information and that Respondents are responsible for protecting the private health information of their patients through its Notice of Privacy Practices. (TR 287, 289-90; LF 212-15). In admitting that they are responsible for protecting the confidential medical information of its patients, Respondents acknowledge that the wrongful disclosure of such information should subject them to liability under Missouri law—a concrete injury.

2. The tort of breach of fiduciary duty is applicable in cases concerning conduct that occurs during the course of treatment.

Respondents argue that a breach of fiduciary duty claim is not applicable in this case, because the unauthorized disclosure of Appellant's confidential blood test results occurred *during the course of treatment*, and the claim should be for breach of the

standard of care and not fiduciary duty. The Missouri Supreme Court has expressly rejected this kind of temporal distinction. Klemme v. Best, 941 S.W.2d 493 (Mo. banc 1997).

In Klemme, the defendant-attorney, relying on Williams v. Preman, 911 S.W.2d 288, 301 (Mo.App. 1995)(*citing* Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624 (Mo. banc 1995)), argued that an attorney's breach of duty to a client during the course of representation is legal malpractice, but a breach of trust which arises out of the relationship, but occurs outside the time frame of the representation, could be a breach of fiduciary duty. Klemme, 941 S.W.2d at 496. The Court concluded:

> This interpretation of Donahue is incorrect. Clients may sue their attorneys for torts other than legal malpractice. As indicated, an attorney may breach a fiduciary duty to a client at any time during their relationship. Williams v. Preman is overruled insofar as it holds otherwise.

Id. at 496. Thus, Missouri courts hold that a claim for breach of fiduciary duty may arise at any time during the relationship.

3. The reasonableness of Respondents' actions is not at issue, and Instruction No. 6 clearly heightened Appellant's burden of proof by requiring an additional element.

Respondents also claim they should not be held strictly liable for innocent disclosures of medical test results. (*Respondents' Brief,* 32). As has already been established by this Court, under a claim of breach of fiduciary duty, a plaintiff need only show (1) disclosure of information, (2) without first obtaining consent, and (3) damages.

Fierstein v. DePaul Health Center, 24 S.W.3d 220, 226 (Mo.App. 2000)("Fierstein II"). By its very nature, a breach of fiduciary duty claim is a more strict type of liability, because it's applied even in the absence of intent or negligence. The Klemme Court expressly addressed the required elements in a claim of breach of fiduciary duty and its contrast to tort principles measured by the standard of care, and held that a claim of breach of fiduciary duty is distinguishable from a claim of negligence. 941 S.W.2d at 495. The Court held: "[p]roof of an attorney's intent is not required to establish breach of fiduciary duty or constructive fraud." Id. at 496.

Indeed, fiduciary liability imposes a higher standard of performance, because a fiduciary is a party to whom another party entrusts confidential information. Failure to fulfill fiduciary responsibilities is determined not so much by the fiduciary's actions as it is by the results of the actions—i.e., damages. If there is an unauthorized disclosure of confidential information with which the fiduciary is entrusted, the information was obviously not safeguarded to the extent expected or required, and the fiduciary therefore failed to meet its obligations.

Respondents compare this case to Budding v. SSM Health Care System, 19 S.W.3d 678 (Mo. 2000), claiming that Appellant asks this Court to apply a strict products liability test where healthcare services have been rendered. (*Respondents' Brief*, 34-35). Budding held that Section 538.210 RSMo. imposes "specific limitations on the traditional tort causes of action available against a health care provider." Id. at 689. Yet Budding was not a breach of fiduciary duty case—it was a case brought under a theory of products liability after a surgeon implanted a faulty medical device. Id. The Court stated "that

chapter 538 forecloses any such claims for strict products liability. . .” and the legislature intended the provisions of the chapter to apply not only to the rendering of health care services but to transfers of goods to a patient. Id.

Here, Respondents were not functioning in the capacity of a health care provider at the time their duty to Appellant was breached, and the act of faxing a document—whether or not performed by a healthcare provider—does not rise to the level of a healthcare service. Moreover, Appellant's “true claim” relates to a breach of a duty of confidentiality, not medical malpractice or products liability. Instruction No. 6, the verdict director submitted to the jury, did not properly instruct the jury as to the elements of a breach of fiduciary duty, because it required Appellant to prove that Respondents were *negligent* when no such requirement exists under Missouri law. (A16, A21; LF 228, 233; TR 519). Without question, the additional element of negligence incorporated into the jury instruction improperly heightened Appellant's burden of proof on the claim of negligence, and misled the jury as to what was required for a showing of a breach of fiduciary duty, resulting in prejudice. Any suggestion that the negligence element in Instruction No. 6 somehow “lessened and eased” Appellant's burden of proof is preposterous. (*Respondents' Brief*, 39). Common sense dictates that any time an additional element is incorporated into a legal test, it is yet another requirement that must be overcome by the party possessing the burden of proof. Accordingly, this Court should reverse and remand for a new trial.

III. REPLY REGARDING THE ISSUE OF AUTHORIZATION

A. The submission of Instruction No. 9—Respondents' affirmative defense of written authorization—was in error.

1. Any suggestion that the jury found Respondents were not negligent is wholly speculative, improper, and irrelevant to the issue of instructional error.

Respondents assert that the trial court's erroneous instruction on the affirmative defense of authorization was immaterial, because the jury did not find Respondents negligent. (*Respondents' Brief*, 40). The jury's verdict provides no support for this position. This Court has long held that speculation as to the basis of a general verdict is both improper and irrelevant to the questions of instructional error and prejudice. McGrath v. Heman Const. Co., 145 S.W. 875, 878 (Mo.App. 1912)("[W]e are not permitted to indulge in that kind of speculation [as to the basis of a general verdict]. It is impossible for us to determine what was in the minds of the jury, governing them in arriving at their verdict when that is a general verdict as here. The instruction . . . . is incorrect. Giving it was prejudicial error against appellant.").

To the extent the transcript in this case gives any clue as to the jury's reasoning, it is far more probable that the trial court's improper "written authorization" instruction confused the jury, since this was the focus of the jury's only question to the trial court during its deliberations. (TR 600). Accordingly, the Court should disregard Respondents' improper and speculative argument.

2. Respondents' disclosure of Appellant's confidential test results was not a disclosure to Appellant.

Respondents also argue that the jury could have found that the disclosure of Appellant's HIV test results to Appellant's employer was a disclosure to Appellant, and therefore Respondents are exempt from liability under §191.656(2)(e). Yet Respondents fail to explain how Appellant's employer could be considered "the subject" of Appellant's test results under §191.656. Respondents also misrepresent the record when they suggest that the reports was sent to a fax machine at Appellant's workplace and that he took possession of the reports immediately, even implying that the fax machine was only accessible to Appellant. (*Respondents' Brief,* 42). The fax machine belonged to Appellant's employer, not Appellant, and evidence was produced at trial that Appellant did not discover the reports until a week after they were faxed to his employer by Respondents. (TR309-10, 366). Moreover, Respondents produced no evidence at trial that they believed they were faxing the test results directly to Appellant. To the contrary, had Appellant written the number on the requisition form himself, Respondents would have attempted to clarify the matter with Appellant's physician. (TR 270-71). Respondents never made this argument to the jury, nor did they request such an instruction be submitted. Accordingly, this Court should reject this argument.

3. Expert testimony is not necessary to prove a claim of wrongful disclosure under §191.656 because Respondents' negligence in violating the statute was within the juror's common knowledge.

Respondents incorrectly argue that the trial court should have granted its motion for directed verdict on the grounds that expert testimony was necessary to establish Respondents' negligence under §191.656. (*Respondents' Brief*, 47-50). "The determination of the question of necessity [of expert testimony] rests in the first instance in the sound discretion of the trial judge and his discretion in this respect will not be set aside in the absence of a showing of an abuse of discretion." Housman v. Fiddyment, 421 S.W.2d 284, 289 (Mo. 1967). "Where the conduct in question does not involve skill or technique in an area where knowledge of such is a peculiar possession of the profession and does involve a matter which any layman or court could know, then such 'professional' testimony is not necessary." Goodenough v. Deaconess Hosp., 637 S.W.2d 123, 126 (Mo.App. 1982)(internal citations and quotation marks omitted).

The Missouri Supreme Court has warned that "[a]n expert witness, in a manner, discharges the functions of a juror; and this evidence should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved." Housman, 421 S.W.2d at 289. The Housman Court found that expert testimony on the question of negligence was improperly admitted, because "the raw physical facts were sufficiently self explanatory and related to the oral testimony that the average juror, on the basis of ordinary knowledge, common sense and practical experience gained in the common experiences of life, could reasonably be expected to draw correct inferences therefrom and determine with reasonable accuracy (the question of negligence)." Id. at 292.

Here, Respondents cannot claim that the trial court abused its discretion in permitting the jury to decide Respondents' negligence under §191.656 without expert testimony. The jury didn't need an expert to decipher the plain meaning of the phrase "faxed to" and explain that it described a past event, not a future instruction. The plain meaning of these words is a matter squarely within the juror's "ordinary knowledge, common sense and practical experience." Housman, 421 S.W.2d at 292. Accordingly, the trial court did not abuse its discretion in overruling the motion for directed verdict and finding that Respondents' negligence was proper for the jury to decide.

4. The trial court erred in submitting Instruction No. 9 because there was no evidence to support "written authorization."

a. Appellant did not only rely on HIPAA in objecting to the instruction.

Respondents argue that there was no evidence to support a defense of written authorization, and they claim Appellant *only* relies on the Health Information Portability and Accountability Act ("HIPAA") in objecting to the instruction relating to authorization. (*Respondents' Brief*, p. 44). This is simply not true. Appellant began his argument by pointing out that there was no evidence of written authorization under §191.656. (*Brief of Appellant*, p. 31).

Respondents further assert that Appellant "cannot dispute that he authorized the reporting of the test, at least insofar as he wanted the results reported to Dr. German." (*Respondents' Brief,* p. 42). Yet, the only written authorization that could form the basis for an affirmative defense under the statute is "the written authorization of the subject of

the test result or results." §191.656.2(c), RSMo. There was simply no evidence to support the contention that Appellant ever executed a written authorization for the disclosure of his confidential medical test results to anyone other than Dr. German or himself. The only notation on the requisition form, "faxed to 361-5358," was written by medical assistant Faith Mustone, not Appellant. (TR 219).

b. Appellant did not waive his argument under HIPAA.

Appellant objected at trial to Instruction No. 9 on the grounds that the affirmative defense of "written authorization" was neither pled nor supported by the evidence. (TR 526-529). Respondents do not dispute, and therefore concede, that Appellant timely raised these objections. Respondents instead complain that Appellant did not raise his HIPAA argument at the earliest opportunity in the litigation and in his submissions concerning how §191.656 or his claim for breach of fiduciary duty are to be interpreted or applied in this case. (*Respondents' Brief*, 44).

Respondents have consistently mischaracterized—and, as a result, the Court of Appeals misunderstood—the nature of Appellant's HIPAA argument and the context in which the issue of HIPAA-compliant authorizations arose. Appellant refers to HIPAA as part of its objection that Instruction No. 9 was not supported by the evidence, but this point is adequately preserved in Appellant's motion for new trial. In his motion, Appellant further explained *why* there was no evidence to support Instruction No. 9, offering more detail in support of its previous objection, not a new or changed objection. (TR 526; LF 188-199). *See* Porta-Fab Corp., v. Young Sales Corp., 943 S.W.2d 686, 692 (Mo.App. 1997)(plaintiff adequately preserved instructional error when he objected that

different pattern instruction should have been submitted, then provided additional detail in its new trial motion *why* it was the appropriate instruction). Moreover, a party is not required to exhaustively list each and every reason in support of an instructional objection at trial, and additional reasons offered in the new trial motion do not render it a new objection. *See, e.g.*, Carroll v. Kelsey, 234 S.W.3d 559, 563 (Mo.App. 2007)(where plaintiff objected at trial that instruction was not supported by evidence, but changed objection on appeal to instruction's language, court held general objection to instruction may be later specified in motion for new trial).

c. The written authorization defense must be interpreted to require HIPAA-compliant authorizations.

Respondents argue that: (1) "HIPAA has no applicability to this situation" because Respondents were "reporting the test results to Dr. German in accordance with his orders," and; (2) HIPAA does not create a private right of action, thus there is no conflict with federal law if §191.656.2(1)(c) is construed to have no requirements for a written authorization. (*Respondents' Brief*, 45-47). Respondents are mistaken on both points.

First, even if Respondents' version of the events were accurate—that Respondents believed they were faxing the test results, not to a third party, but to Appellant's physician—it is entirely inconsistent with the defense of "written authorization." If Respondents' believed they were faxing the test results to Dr. German, they cannot now argue that the "faxed to" notation was Appellant's written authorization to disclose the test results to Appellant's employer. Furthermore, the argument that a "written authorization" need not be HIPAA complaint is incorrect. HIPAA preempts any State

law that is construed to be less stringent in protecting a patient's privacy. State ex rel. Proctor v. Messina, 320 S.W.3d 145, 149-50 (Mo. 2010). Where it is possible to construe State law as permitting compliance with both HIPAA and State law, there is no true conflict such that preemption will be found. Id. at 153-54. Messina found no preemption because plaintiffs' physicians could comply with both State law and HIPAA by conducting *ex parte* discussions with defense counsel pursuant to valid HIPAA-compliant authorizations. Id.

Here, either the Court can construe the Missouri law as having no requirements for written authorization, and therefore is preempted by HIPAA because it is less stringent; or it can deem HIPAA's authorization requirements to be "superimposed" because it would be possible to comply with both HIPAA's authorization requirements and Missouri law.[2]

Secondly, Respondents argue that because HIPAA provides no private right of action, Appellant has no remedy. Respondent ignores the fact that only *less stringent* State laws are preempted, not more stringent State laws. *See* Yath v. Fairview Clinics, *N.P.*, 767 N.W.2d 34, 49-50 (Minn.App. 2009)(finding statute providing for damages for wrongful disclosure of private medical information was not preempted by HIPAA, because it provided additional remedy as disincentive for disclosures prohibited by HIPAA).

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[2] Other jurisdictions have also adopted this approach. *See, e.g.*, Arons v. Jutkowitz, 880 N.E.2d 831 (N.Y. Ct.App. 2007).

Because there was no evidence to support a finding of written authorization by Appellant, and the Instruction was prejudicial, this Court should reverse and remand for a new trial.

IV. CONCLUSION

For foregoing reasons, the erroneous decisions made at trial should be reversed and this matter remanded to the Circuit Court of the City of Saint Louis, Missouri for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing Brief of Appellant complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7,708 words as determined by MS Word 2003 v11. The foregoing Brief includes all the information required by Supreme Court Rule 55.03. An email copy has been filed with the Brief and served on Respondents' counsel and has been scanned for viruses and is virus free.

Dated: November 20, 2012

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The undersigned certifies that on November 20, 2012, a copy of the foregoing was served by the Court's electronic filing system or by electronic mail, upon counsel for Respondents:

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